RECORD AND BRIEFS

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In the

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity
as
Attorney General of the State of New York, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE NEW YORK CREDIT UNION ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. Surcharge bans provide states the most effective means of protecting consumers against excessive credit card costs. 7

A. In countries where they are authorized, surcharges inevitably become a source of merchant revenue instead of a mechanism to recoup transaction costs. 9

B. Merchants exercise monopoly control over how large a surcharge consumers pay. 13

C. Credit card surcharges promote misleading pricing tactics and dubious marketing schemes that exploit among the most powerful of pricing biases. 15

D. Banning "excessive surcharges" will not protect consumers from the negative consequences of surcharging. 17

E. The legislative history of section 518 demonstrates that New York anticipated the negative consequences of surcharging experienced in other countries. 19

II. SECTION 518 DOES NOT TRIGGER FIRST AMENDMENT PROTECTIONS. 20

A. New York General Business Law section 518 imposes a ban on credit card surcharges above the headline price. 20

B. Consumers do not construe pricing as merchant expression. 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

City of Dallas v. Stanglin, 490 U.S. 19 (1989) 18

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 7

Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430 (2013) 4

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 18

Mobile Oil Exploration & Producing Se. Inc. v. United Distrib. Cos., 498 U.S. 211 (1991) 7

Nebbia v. New York, 291 U.S. 502 (1934) 7

Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011) 19

People v. Fulvio, 514 N.Y.S.2d 594 (N.Y. Crim. Ct. 1987) 17

Spence v. Washington, 418 U.S. 405 (1974) 18

Texas v. Johnson, 491 U.S. 397 (1989) 18

Tinker v. Des Moines Ind. Comm. School District, 393 U.S. 503 (1969) 18

Welsh v. United States, 398 U.S. 333 (1970) 4

Statutes

N.Y. GEN. BUS. LAW § 399-zzz (McKinney 2016) 18

NYLS' Governor's Bill Jacket to ch. 160, S. 8367, Assemb. 10189 (NY 1984) 17

Other Authorities

Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321 (2008) 16

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Feedback statement on European Commission Green Paper, Towards an integrated European market for card, internet and mobile payments, COM (2011) 0941 final (June 27, 2012), *available at* http://ec.europa.eu/internal_market/payments/docs/cim/gp_feedback_statement_en.pdf 16

Letter from Gerard Brody, Dir., Policy and Campaigns, and David Leermakers, Senior Policy Officer, Consumer Action Law Ctr. to the Reserve Bank of Austl. (Feb. 9, 2012), *available at* http://consumeraction.org.au/wp-content/uploads/2012/04/A-Variation-to-Surcharging-Standard.pdf 12

OFFICE OF FAIR TRADING (U.K.), THE IMPACT OF PRICE FRAMES ON CONSUMER DECISION MAKING 21–25 (2010), *available at* http://webarchive.nationalarchives.gov.uk/20140402142

426/http:/www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf 14

RESERVE BANK OF AUSTRALIA, GUIDANCE NOTE: INTERPRETATION OF THE SURCHARGING STANDARDS (2012), *available at* http://www.rba.gov.au/payments-and-infrastructure/cards/201211-var-surcharging-stnds-guidance/guidance-note.html 12

RESERVE BANK OF AUSTRALIA, REVIEW OF CARD PAYMENTS REGULATION: CONCLUSIONS PAPER 14–15 (2016), *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf 12

Laws of Foreign Jurisdictions

Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, art. 19, 2011 O.J. (L394) 64 (EU) 11

Directive 2015/2366, of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, 2015 O.J. (L337) 35 (EU) 10

Impact Assessment, Proposal for a Directive of the European Parliament and of the Council on Payment Services in the Internal Market and Proposal for a Regulation of the European Parliament and of the

Council on Interchange Fees for Card-Based Payment Transactions, SWD (2013) 0288 final (July 24, 2013) .. 11

Impact Assessment: Payment Surcharges 2012/BIS0380 10

Michele Bullock, *A Guide to the Card Payment System Reforms*, RBA BULLETIN, Sept. 2010 11

Report from the Commission to the European Parliament and the Council on the Application of Directive 2007/64/EC on Payment Services in the Internal Market and on Regulation (EC) No. 924/2009 on Cross-Border Payments in the Community, COM (2013) 0549 final (July 24, 2013) 11

RESERVE BANK OF AUSTRALIA, A VARIATION TO THE SURCHARGING STANDARDS: A CONSULTATION DOCUMENT 2–3 (2011) 11

Reserve Bank of Australia, Standard No. 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions s 4, *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/conclusions-paper-may2016/appendix-a.html 16

The Consumer Rights (Payment Surcharges) Regulations, 2012, S.I. 2012/3110 (U.K.) 10

STATEMENT OF INTEREST

The New York Credit Union Association is a century-old institution dedicated to advancing and protecting the interest of credit unions.[1] Credit unions are member owned not for-profit cooperatives which, unlike banks, cannot rely on stocks to increase their capital.

The outcome of this case may have a direct financial impact on New York credit unions, approximately half of whom offer credit cards and receive interchange income.

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[1] All parties have consented to the filing of this Brief. Such consents shall be submitted herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

State no-surcharge laws regulate economic conduct and do not unconstitutionally restrict speech conveying price information.

The opinion of the District Court below begins quite colorfully with a reference to Lewis Carroll's *Through the Looking Glass*. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 435 (2013) ("Alice in Wonderland has nothing on section 518 of the New York General Business Law."). Petitioners and Humpty Dumpty share something in common: they both believe that words mean only what they want them to mean. *See* LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 124 (1871) ("When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things.").

In this case, petitioners have decided that "surcharge" and "discount" have the same meaning because, in some cases, either mechanism can result in the same price. Amicus urges the Court's caution, for "[u]nless we are to assume an Alice-in-Wonderland world where words have no meaning," *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring), the very real differences between surcharges and discounts and their divergent economic and social implications, and New York's decision to permit the latter while forbidding the former, should be respected.

The New York State Legislature passed New York General Business Law Section 518 based on the understanding that surcharges and discounts are in fact separate and distinct pricing mechanisms, and not merely two words for the same conduct. The state, in a valid exercise of its police power, determined that it was in the public interest to prohibit a merchant from imposing a surcharge above the headline price on a consumer who chooses to pay with a credit card. It does not prohibit merchants from describing their pricing structures in their own words, or from engaging in advocacy regarding their desire to charge more to consumers who pay with credit cards.

In other words, section 518 regulates what merchants may do, not what they may say. This is clear from the plain meaning of the statute, and any argument to the contrary consequently must fail.

Moreover, the effects of surcharging are no longer confined to the realm of economic speculation. Australia, the European Union, and the United Kingdom have all either eliminated or severely restricted the use of merchant surcharges in recent years. These developments have been prompted by mounting evidence that surcharging does not provide a mechanism to recoup merchant transaction costs, but instead constitutes a source of revenue derived from consumers who have no way to ascertain the actual cost of credit.

Take, for example, the pricing structure that Petitioner Expressions Hair Design employs. Expressions Hair Design charges customers a three-

percent surcharge over the headline price for customers who choose to pay for their haircuts with credit cards. J.A. 60; Pet. Br. at 20. Although they claim to have changed their signage after learning of the law in question, they apparently have not changed this price structure. *See* Pet. Br. at 20; J.A. at 60–61. Therefore, Expressions Hair design imposes a three-percent surcharge on consumers who pay with credit cards, even though their actual costs of accepting those cards may significantly less in many cases.[2] Consumers have no way of knowing what Expressions' actual costs of card acceptance are, and they have no way of knowing that part of the "surcharge" is actually just increased revenue, unrelated to the cost of accepting credit.

The state's compelling interest in shielding consumers from the harm that results from credit card surcharging, as evidenced by the examples of other countries, cannot reasonably be questioned. Petitioners argue that the First Amendment prohibits states from banning surcharges while simultaneously authorizing cash discounts; but no-surcharge laws are economic regulations that do not infringe on merchants' rights of Free Speech, and petitioners cannot invoke the First Amendment to accomplish in the Supreme Court what must be done in the chambers of Congress or state legislatures.

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[2] *See Merchant Processing Fees in the U.S.*, NILSON REPORT, May 2014, at 12, *available at* https://www.nilsonreport.com/upload/issues/1041_0002.pdf (Noting that the average credit card acceptance fee for all Visa and MasterCard cards was 2.17% in 2013).

In this case, petitioners have draped their challenge to a valid economic regulation in the garb of Free Speech, a masquerade designed to achieve in Court what must be done in Congress or state legislatures. It is a clever but disingenuous means of allowing large retailers to maximize profits at the expense of consumers.

It trivializes the very freedom protected by the first amendment.

Accordingly, the Court should affirm the judgment of the Second Circuit and hold that New York's no-surcharge law regulates economic conduct, not speech.

SUMMARY OF ARGUMENT

New York General Business Law section 518 prohibits merchants from charging more than the headline price for purchases made with a credit card, while permitting merchants to offer cash discounts. N.Y. GEN. BUS. LAW § 518 (McKinney 2016). It is a classic regulation of economic activity. The petitioners contend that section 518 serves no legitimate purpose. To contrary, section 518 serves to protect consumers and the economy.

In fact, Australia, the European Union, and the United Kingdom have all authorized surcharging, only to subsequently eliminate or restrict its use. Their experience demonstrates that if New York's law is struck down, consumers will be forced to pay surcharge fees far in excess of merchant transaction costs. Furthermore, existing statutes banning unfair and deceptive practices will not be sufficient to prevent excessive charges.

Furthermore, section 518 question does not violate the first amendment because it does not regulate speech. It regulates economic conduct.

Therefore, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. Surcharge bans provide states the most effective means of protecting consumers against excessive credit card costs.

The Court's "decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). This case is no different. And like the cases that have come before it, Petitioners attempt to strike down a valid regulation of economic conduct on First and Fourteenth Amendment grounds should not succeed.

It is well-settled that "[s]tates are accorded wide latitude in the regulation of their local economies under their police powers." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Regulations of economic conduct, specifically those regulating pricing activity, have existed in the United States "from its first colonization," *Munn v. Illinois*, 94 U.S. 113, 125 (1876), and the Court has consistently upheld such laws under rational basis review. *See, e.g., Mobile Oil Exploration & Producing Se. Inc. v.*

United Distrib. Cos., 498 U.S. 211, 221-26 (1991) (upholding law regulating the price of natural gas); *Nebbia*, 291 U.S. at 537 (upholding law fixing milk prices). Notably, such laws have never before been held to unconstitutionally restrict speech. Rather, they have been upheld as valid regulations of economic conduct.

Petitioners' First Amendment argument, as augmented by amici, suggests that there is no

justification for section 518 other than to protect the interests of credit card companies. *See* Brief of Petitioner ("Pet. Br.") at 1, 8, 9, 11, 14–16; Brief of Professor Adam J. Levitin as Amicus Curiae Supporting Petitioners at 11–13 [hereinafter Levitin Br.]. They argue that, without this statute, merchants, unshackled by surcharge prohibitions, will dutifully charge credit card users no more than the cost of processing credit card transactions. *See* J.A. at 43, 47, 51, 56; Brief for Consumer Action and National Association of Consumer Advocates as Amici Curiae in Support of Petitioners at 2, 5, 6 [hereinafter Consumer Action Br.]. They claim that, with the cost of providing credit borne by the party who chooses to use it, patrons using cash will benefit from lower prices, which will be particularly helpful to poorer consumers who cannot afford the convenience of credit.

Fortunately for the Court, the impact of surcharges is no longer confined to theoretical constructs. Over the last decade, Australia, the European Union, and the United Kingdom have all authorized credit card surcharges, only to eliminate them or severely restrict their use in the last few years. These experiences are instructive because they show that statutes like New York's reflect substantive policy preferences. They are precisely the type of economic regulation that has long been recognized as being within the scope of legislative powers. Plainly, they do not restrict speech.

A. In countries where they are authorized, surcharges inevitably become a source of merchant revenue instead of a mechanism to recoup transaction costs.

In 2011, a consumer group lodged a formal "super complaint"[3] supported by over 40,000 petitioners, with the U.K. Office of Fair Trading (OFT). It alleged that merchants in general, and the travel and tourism industries in particular, routinely imposed surcharges "many times" the additional costs the retailer would incur for accepting card payments. *See* Which? Super-Complaint: Credit and Debit Surcharges ii, vi, submitted to Office of Fair Trading (U.K.) March 30, 2011, *available at* http://www.staticwhich.co.uk/documents/pdf/payment-method-surcharges-which-super-complaint-249225.pdf.

The complaint further alleged that consumers often have no effective payment alternatives such as when needing to book a seat on a crowded flight or paying for an online purchase. *See id.* at 58–62. For example, surcharge fees represented up to fourteen percent of ticket prices. *Id.*

In 2012, following a government investigation, the United Kingdom enacted regulations banning excessive surcharges. The legislation made it illegal for merchants to charge fees that exceeded a payment

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[3] A "Super Complaint" is a complaint filed by designated consumer groups to which it has to respond, *See* Enterprise Act, 2002, c. 40, § 11(U.K.).

method's cost of acceptance. The Consumer Rights (Payment Surcharges) Regulations, 2012, S.I. 2012/3110 (U.K.). The regulation was intended to address "the dilution of price transparency" resulting from card surcharges in excess of merchant costs, "typically employed as a form of drip pricing." *See* Impact Assessment: Payment Surcharges at 1, I.A. 2012/BIS0380, *available at* http://www.legislation.gov.uk/ukia/2012/437/pdfs/ukia_20120437_en.pdf. Among the stated policy objectives and intended effects was for "[p]ayment surcharges to become more cost reflective." *Id.*

The European Union took an even more decisive step in 2015, however, when it coupled a ban on interchange fees for almost all credit and debit card transactions with a corresponding ban on surcharges. Directive 2015/2366, of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, art. 62, ¶ 4, 2015 O.J. (L337) 35 (EU). The European Commission concluded in its Impact Assessment that, "in those countries where surcharging is allowed, surcharges are sometimes exploited by retailers who applied excessive surcharges to increase their revenues." *Impact Assessment, Proposal for a Directive of the European Parliament and of the Council on Payment Services in the Internal Market and Proposal for a Regulation of the European Parliament and of the Council on Interchange Fees for Card-Based Payment Transactions*, at 25, SWD (2013) 0288 final (July 24, 2013).

This occurred even though a prior E.U. directive ostensibly prohibited excessive surcharging. *See id.*; Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, art. 19, 2011 O.J. (L394) 64 (EU). Notably, prior to the enactment of Directive 2015/2366, fourteen member countries of the European Union had already banned surcharging altogether. *Report from the Commission to the European Parliament and the Council on the Application of Directive 2007/64/EC on Payment Services in the Internal Market and on Regulation (EC) No. 924/2009 on Cross-Border Payments in the Community*, at 7, COM (2013) 0549 final (July 24, 2013).

Even Australia, which was in the forefront of eliminating credit card surcharge bans in 2003, has moved to severely restrict them. Initially, it authorized merchants to surcharge without restriction, believing that this "open ended" approach would drive down interchange fees with little if any negative impact on consumer costs. *See* RESERVE BANK OF AUSTRALIA, A VARIATION TO THE SURCHARGING STANDARDS: A CONSULTATION DOCUMENT 2–3 (2011), *available at* http://www.rba.gov.au/publications/consultations/201112-variation-surcharging-standards/pdf/201112-variation-surcharging-standards.pdf; *See also* Michele Bullock, *A Guide to the Card Payment System Reforms*, RBA BULLETIN, Sept. 2010, at 56–58, *available at* http://www.rba.gov.au/publications/bulletin/2010/sep/pdf/bu-0910-7.pdf.

Eventually, evidence of excessive surcharging resulted in calls for change. As one consumer group explained, the practice was becoming widespread and was of particular concern in situations where consumers have little ability to choose alternative payment methods, such as booking flights online. Letter from Gerard Brody, Dir., Policy and Campaigns, and David Leermakers, Senior Policy Officer, Consumer Action Law Ctr. to the Reserve Bank of Austl. (Feb. 9, 2012), *available at* http://consumeraction.org.au/wp-content/uploads/2012/04/A-Variation-to-Surcharging-Standard.pdf. By 2015, airlines were regularly imposing surcharges exponentially higher than processing costs.[4]

The Reserve Bank of Australia responded by giving credit card companies the right to limit surcharges to "the reasonable cost of acceptance," and providing guidance as to what costs could be included in a surcharge. RESERVE BANK OF AUSTRALIA,

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[2] In March 2015, Australian airlines imposed the following surcharges:

> Qantas: $7 card payment fee on a $200 ticket = 3.5% surcharge.
> Virgin: $7.70 card payment fee on a $135 ticket = 5.70% surcharge.
> Jetstar: $8.50 card payment fee on a $85 ticket = 10% surcharge.
> Tiger: $8.50 card payment fee on a $95 ticket = 8.95% surcharge.

See Andy Kollmorgen, *Surcharging Bans Take Effect*, CHOICE.COM.AU, https://www.choice.com.au/money/credit-cards-and-loans/credit-cards/articles/accc-to-put-a-stop-to-excessive-credit-card-surcharging (last updated September 1, 2016).

GUIDANCE NOTE: INTERPRETATION OF THE SURCHARGING STANDARDS (2012), *available at* http://www.rba.gov.au/payments-and-infrastructure/cards/201211-var-surcharging-stnds-guidance/guidance-note.html. But this did not allay the concerns of the public and policy makers.

In 2015, the Australian Legislature passed an amendment to the Competition and Consumer Act of 2010 to ban excessive and unfair payment surcharging by merchants. Regulations effective in September of 2016 impose detailed restrictions on what costs can be considered by merchants imposing surcharges and generally limit them to the average cost of card acceptance. *See* RESERVE BANK OF AUSTRALIA, REVIEW OF CARD PAYMENTS REGULATION: CONCLUSIONS PAPER 14–15 (2016), *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf.

B. Merchants exercise monopoly control over how large a surcharge consumers pay.

Surcharge advocates envision a world in which consumers, deterred from using credit cards, turn to less expensive forms of payment. *See* Pet. Br. at 7; Brief for Alan S. Frankel as Amicus Curiae in Support of Petitioners at 6; Consumer Action Br. at 11. But as the Which? Super Complaint explains, *see supra* Part I.A, even when a retailer "offers a number of alternative payment methods, that retailer retains a monopoly on the setting of the prices that the

customer will pay for different payment methods." Which?, *supra*, at iii.

Moreover, consumers are increasingly dependent on credit cards to facilitate timely purchases. These findings will not surprise anyone who has recently gone online for a last-minute holiday present. *See* FEDERAL RESERVE SYSTEM, THE 2013 FEDERAL RESERVE PAYMENTS STUDY: RECENT AND LONG-TERM TRENDS IN THE UNITED STATES: 2000-2012 13–14, 17 (2014), *available at* https://www.frbservices.org/files/communications/pdf/general/2013_fed_res_paymt_study_detailed_rpt.pdf. In many of these circumstances, merchants have an effective monopoly over how much the consumer pays to complete the transaction.

As a result, instead of encouraging consumers to use cheaper payment methods, consumers feel they have little choice but to pay highly excessive fees. In Australia, despite the imposition of fees clearly in excess of processing costs, eighty-eight percent of online survey respondents indicated that they had paid a credit card surcharge in the previous year; more than fifty percent paid a surcharge between one and five times, while twenty-two percent paid surcharges more than ten times in the previous twelve months. *See* CHOICE REPORT: CREDIT CARD SURCHARGING IN AUSTRALIA 7–10 (2010), *available at* http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Credit_card_surcharges_part1.pdf.

C. Credit card surcharges promote misleading pricing tactics and dubious marketing schemes that exploit among the most powerful of pricing biases.

If section 518 is struck down, consumers will be led to believe that surcharges reflect the "true cost of credit," *see, e.g.*, Pet. Br. at 1, 8, 11 & n.2; Levitin Br. at 5; Brief for Ahold U.S.A., Inc. et al. as Amici Curiae in Support of Petitioners at 7, 30; when in reality, the amount of the surcharge is in no way tethered to the merchant's cost of accepting credit cards. This result serves to distort rather than clarify the "true cost of credit."

For example, an analysis of the United Kingdom's surcharge legislation concluded that surcharging resulted in distorted price signals by encouraging retailers to use "drip pricing" techniques that made it difficult for consumers to identify and respond to transaction costs. *See* Impact Assessment: Payment Surcharges, *supra*, at 2. Specifically, the legislation's Impact Assessment states that "surcharges are typically employed as a form of drip pricing, whereby the consumer does not see the final transaction price until after completing several forms. This is to the detriment of consumers as they cannot effectively compare prices to secure the best deals." *Id.*

In restricting surcharging, the British Government surmised that even though merchants were likely to charge higher prices for their products,

consumers would, on balance, benefit by receiving more accurate price information. *See id.*

In addition, merchants know that consumers anchor their price assumptions based on the lowest price they see. OFFICE OF FAIR TRADING (U.K.), THE IMPACT OF PRICE FRAMES ON CONSUMER DECISION MAKING 21–25 (2010), *available at* http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf. A body of experimental research offers empirical evidence regarding impact of price framing on consumer choice. In an auction experiment, participants were instructed to bid for a jar of pennies. *Id.* at 22. One group was told that they must pay fifteen cents in addition to the bid if they won the auction. *Id.* at 22–23. A second group was told that if they won the bid, the price they would pay would simply be the bid price. *Id.* at 23. The group that was not told the full price showed a higher level of demand for the pennies, reflected in the fact that they were more likely to increase their bid than the group that knew that total price. *Id.*

Similarly, in another experiment, consumers were told the prices of a telephones, with one group seeing the total cost including shipping and handling, and another group seeing the base price with additional charges reported separately. *Id.* Participants in the group that was shown partitioned pricing, in which the base price and surcharges were reported separately, consistently recalled lower total prices than the group given the total price. *Id.*

Unrestricted credit card surcharging allows merchants to take advantage of this pricing bias through drip pricing and other dubious pricing and marketing strategies. These tactics are designed to maximize profits at the expense of consumers. No-surcharge laws are designed to protect consumers from such practices and are thus legitimate economic regulations. They have nothing to do with speech.

D. Banning "excessive surcharges" will not protect consumers from the negative consequences of surcharging.

Petitioners argue that section 518 fails the fourth prong of the Court's test for commercial speech announced in *Central Hudson*[5] because excessive surcharging can be addressed by proper disclosures and enforcement of existing laws banning deceptive advertising. *See* Pet. Br. at 41–42. As described above, the experience of countries that have authorized surcharging tells a different story.

In eliminating surcharges, the European Union, in particular, concluded that it was difficult to establish cost categories and "that there was no practical way to enforce this provision or to control how these costs are calculated by merchants." *See Feedback statement on European Commission Green Paper, Towards an integrated European market for card, internet and mobile payments*, at 17, COM (2011) 0941 final (June 27, 2012), *available at* http://ec.europa.eu/internal_market/payments/docs/ci

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[5] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).

m/gp_feedback_statement_en.pdf. At the same time, there was general support among market participants for continuing to allow merchants to offer rebates. *Id.*

Excessive surcharges cannot easily be defined or identified. An effective regulation would have to capture the costs incurred by large retailers such as Walmart as well as smaller merchants like Expressions Hair Design. It would involve calculating not only direct costs such as fees paid to the merchant's processing bank, but also indirect costs ranging from the costs of fraud to the costs of payment terminal rentals. The information would then have to be calculated by merchants and periodically updated to reflect changed circumstances. *See Reserve Bank of Australia, Standard No. 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions* s 4, *available at* http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/conclusions-paper-may2016/appendix-a.html.

Notably, while surcharges are difficult to quantify and require statutorily-imposed caps to protect consumers, discounts such as those authorized by section 518 have a built-in mechanism for ensuring that merchants can recover their costs without harming consumers. This is because a "merchants' ability to discount is limited by the spread between the credit price and the merchandise cost to the merchant. If the merchant offers discounts by more than that spread, the merchant will lose money on the transaction." Adam J. Levitin, *Priceless? The*

Economic Costs of Credit Card Merchant Restraints, 55 UCLA L. REV. 1321, 1352 (2008). In contrast, surcharges have no such internal mechanism for controlling the amount of the price differential; in a landscape of unrestricted surcharging, it is open season for merchants to impose surcharges well in excess of their costs.

E. The legislative history of section 518 demonstrates that New York anticipated the negative consequences of surcharging experienced in other countries.

Petitioners frame New York's no-surcharge law as "criminaliz[ing] truthful, non-misleading speech that best informs consumers about the cost of credit cards." Pet. Br. at 26–27. To the contrary, no-surcharge laws protect against deceptive, misleading conduct that obfuscates the true cost of credit and creates opportunities for windfall profits for merchants to the detriment of consumers. The legislative history of section 518 demonstrates that the New York State Legislature passed this law for precisely this reason. *See* NYLS' Governor's Bill Jacket to ch. 160, S. 8367, Assemb. 10189, at 5 (NY 1984).

Through section 518, the New York State Legislature intended to address "an unfair disadvantage" faced by credit card users as a result of the expiration of the federal surcharge ban in February 1984. *Id.* The Legislature feared that "the consumer would be subject to dubious marketing practices and variable purchase prices." *Id.*

In other words, the unbridled ability of merchants to impose credit card surcharges would leave consumers vulnerable to deception at the point of sale, and would allow for excessive surcharging beyond the recovery of the merchant's costs. The experiences of Australia, the European Union, and the United Kingdom demonstrate that these concerns were not unfounded.

II. SECTION 518 DOES NOT TRIGGER FIRST AMENDMENT PROTECTIONS.

A. New York General Business Law section 518 imposes a ban on credit card surcharges above the headline price.

Since New York bans surcharges while permitting cash discounts, it may or may not be permissible for a merchant to charge $100 to a consumer buying a widget in cash and $102 for purchasing the same product with a credit card. Contrary to the position of the petitioners, however, the legality of this conduct does not hinge on how the merchant chooses to characterize the price differential, but on whether the widget's headline price is higher than the credit card price. If it is, then the price differential is a cash discount, a perfectly legal price incentive.

This distinction has been understood in New York for over three decades. In *People v. Fulvio*, a gas station owner who was charged with violating section 518 did not dispute that he charged customers who paid with credit cards more than those paying in cash. *See People v. Fulvio*, 514 N.Y.S.2d 594, 596 (N.Y.

Crim. Ct. 1987). The legality of this conduct hinged not on whether the defendant implemented a price differential, but whether the price differential was the result of a surcharge above the headline cash price. As the court explained, the "[d]efendant's contention that the charge for gasoline in excess of the cash price was a cash discount and not a surcharge may, if sufficiently demonstrated by him, be a valid trial defense to . . . General Business Law § 518." *Id.* at 596–97.

In addition, the Legislature has taken this approach in protecting New Yorkers who are more comfortable dealing with the postal service than email. State law prohibits businesses from charging consumers an additional rate, fee, or fee differential for receiving billing statements or making payments by mail, while permitting them to offer consumers "a credit or other incentive to elect a specific payment or billing option." N.Y. GEN. BUS. LAW § 399-zzz (McKinney 2016). The result is that consumers agreeing to make online payments often pay less when paying their bills than do consumers who pay through the mail.

The constitutionality of section 399-zzz has never been challenged. Any such challenge would surely fail, because it is a valid regulation of economic conduct.

B. Consumers do not construe pricing as merchant expression.

Petitioners contend that the very act of imposing a surcharge constitutes expressive conduct entitled to

First Amendment protection. This is incorrect. The Court "has long recognized that [the First Amendment's] protection does not end at the spoken or written word," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), but the First Amendment's protection of speech is not boundless. The mere fact that a course of conduct necessarily implicates the use of words or labels does not, without more, transform that conduct into protected speech. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

To determine whether conduct is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence v. Washington*, 418 U.S. 405, 409 (1974), the Court asks whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410–11; *Johnson*, 491 U.S. at 404. The Court has held that conduct constitutes protected symbolic speech when it is recognizably tied to a contemporaneous issue or would otherwise clearly be understood as conveying a

message based on the context. *Spence*, 418 U.S. at 410–11 (affixing a peace sign to an American flag); *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, 514 (1969) (wearing black armbands in school to protest Vietnam War).

The Case presently before the Court is clearly distinguishable from cases in which the Court has found expressive conduct to constitute protected speech. Whereas in *Spence* and *Tinker* "it would have been difficult for the great majority of citizens to miss the drift of" the expressive conduct, *see Spence*, 418 U.S. at 410; *Tinker*, 393 U.S. at 505–14, the act of imposing a credit card surcharge has no inherently communicative qualities, is not tied in any way to a social issue or viewpoint, and would never be understood as intending to express a message. It is quite simply a pricing scheme; an economic activity devoid of communicative intent or comprehensibility.

Petitioners also cite their beliefs regarding the propriety, fairness and effectiveness of the no-surcharge law, its broader impacts, or their beliefs that they could realize significant savings if they could impose surcharges, to support the proposition that surcharging should enjoy First Amendment protection. *See* J.A. at 20, 43, 47, 56, 57, 61. However, the act of surcharging is fundamentally nonsymbolic, and the Court has held that nonsymbolic actions cannot enjoy First Amendment protection, even when the actor is motivated by a particular belief or idea. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011) (finding that the act of voting does not constitute protected speech).

The instant case invokes the Court's holding in *Carrigan*. In *Carrigan*, the Court observed: "the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech. Nor does the fact that action may have social consequences . . . ." *Carrigan*, 564 U.S. at 127. The same conclusion is warranted in this case. Neither petitioners' beliefs regarding the wisdom or fairness of New York's no-surcharge law, nor the possibility that such laws may have social consequences, is enough to transform the pricing scheme of surcharging into protected speech.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

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Respectfully submitted,

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